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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of the Commission's ) WT Docket No. 97-82  
Rules Regarding Installment Payment )  
Financing for Personal Communications )  
Services (PCS) Licenses )  
\_\_\_\_\_ )

To: The Commission

**COMMENTS**

On October 16, 1997, the Commission adopted its *Second Report and Order and Further Notice of Proposed Rulemaking* ("FNPRM" or "Second R&O")<sup>1</sup> seeking comment on the Commission's proposed rules governing the reauction of spectrum returned under the various restructuring options made available to C block licensees. DigiPH PCS, Inc. ("DigiPH"),<sup>2</sup> by its attorneys, hereby submits its comments in response to the FNPRM. Specifically, DigiPH urges that the Commission adopt reauction procedures which do not prejudice the rights of C block licensees who have abided by the Commission's original rules and commenced, or completed, the build out of their networks.

**I. SUMMARY**

DigiPH asserts that the Commission's proposal for reauction of the returned spectrum is unfair in its treatment of those C block licensees who justifiably relied on the Commission's

<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 97-82 (released October 16, 1997).

<sup>2</sup> DigiPH participated in the C block auction under the name Mobile Tri-States L.P. 130, and holds C block licenses for eight (8) BTAs in Mississippi, Alabama and Florida.

original rules and have made progress in the build out of their systems. In essence, DigiPH asserts that disallowing installment payments upon reauction severely impacts those licensees, who like DigiPH, are nearly ready to commercially launch their networks, and thus, are not in a position to surrender their licenses or disaggregate their spectrum.<sup>3</sup> In addition, DigiPH's licenses are the major source of collateral for its private financing. As a result, the reauction of spectrum without installment payments devalues DigiPH's collateral because cash bids will be substantially lower than bids financed over several years. DigiPH's financing, and ultimately, its ability to complete construction of its network is threatened by the proposed reauction without the installment payment option.

## II. REAUCION PROCEDURES

In general, reauction of the returned spectrum unfairly disadvantages those entities which have justifiably relied on the Commission's initial rules and are currently building out their networks. DigiPH obtained the requisite financing, made its installment payments in a timely fashion, and began construction of its network under the assumption that the rules originally promulgated by the Commission would govern how DigiPH operates its business and pays for its licenses. Now, by reauctioning returned spectrum and/or licenses without an installment option, the Commission will skew the playing field to the advantage of those licensees who obtain licenses on reauction. In short, DigiPH urges the Commission to consider changes to the

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<sup>3</sup> See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Affirming and Dissenting Separate Statement of Chairman Reed E. Hundt Re: C Block Financing Issues*, WT Docket No. 97-82 at 6 (released October 16, 1997) (hereinafter "Chairman's Separate Statement"). Those licensees who have made significant progress in their build outs "do not have the same flexibility as other licensees to disaggregate or participate in a 'full price buy out'".

procedures for reauctioning spectrum such that DigiPH, and similarly situated C block licenses, are not punished for adhering to the Commission's original rules.

**A. Elimination of Installment Payments Will Devalue C Block Licenses to the Detriment of Responsible Entities that Have Justifiably Relied on the Commission's Rules**

**1. Reauction Without Installment Payments Will Result in Lower Bids**

The Commission's proposal to eliminate installment payments from the reauction of returned licenses or spectrum is patently unfair to those C block entities which retain their licenses. The time-value of money, a fundamental basis for any economic analysis, factored heavily into C block bidder's business plans and auction strategies. The initial auction allowed for payment of winning bids in installments over a ten-year period. Thus, bidders could justify significantly higher bids and remain within the confines of their business plans and/or auction strategies.<sup>4</sup> Without an installment option, the reauction will result in significantly lower bids for the returned spectrum.<sup>5</sup>

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<sup>4</sup> The average price per MHz, per pop for C Block licenses was \$1.33. This is more than twice the cost of the A and B blocks and four times greater than the D, E and F blocks. *See In the Matter of FCC Report to Congress on Spectrum Auctions, Report*, WT Docket No. 97-150 (released October, 9, 1997).

<sup>5</sup> Marketplace changes are partly responsible for the devaluation of spectrum held by C block licensees. For example, since the close of the initial C block auction, the Commission has auctioned the D, E and F spectrum; the A and B block licensees have benefited from a two year head start on building their networks; bidders obtained WCS spectrum at spectacularly low prices; the second and third largest C block licensees have filed for bankruptcy; and the announcement of future auctions threatens to glut the market for spectrum. Now, the Commission's proposal to reauction spectrum without installments further exacerbates the devaluation. The greatest harm of this proposal falls on those responsible entities that have progressed with their build out, and relied on the Commission's existing rules.

This is a significant, fundamental change to the Commission's rules, and has two severely adverse impacts on DigiPH and similarly situated licenses. First, it devalues the licenses which DigiPH retains — the major assets which underlie DigiPH's stock, which, in turn, is the main source of collateral for its financing. As a result, DigiPH's financing and its ability to complete construction of its network is jeopardized. Second, it saddles DigiPH with a significantly heavier burden in paying for its licenses, and forces DigiPH to pay for licenses with dollars which could be utilized for building its network and providing service to the public. The former Chairman realized the potential for such harm:

These licensees [who have proceeded to build out networks] must compete for capital in the public markets with other C block licensees, including winners of the subsequent reauction. To the extent that such a reauction of spectrum returned under any of the options in our Order today "resets" the market price for spectrum, it could impair access to capital for those licensees that are significantly built out but which carry artificially higher prices per pop.<sup>6</sup>

Under the rules of the initial C block auction, prudent bidders factored installment payments into their business plan, and bid accordingly.<sup>7</sup> Now, the Commission has proposed to reauction the returned spectrum without an installment option. Without the ability to leverage the cost of their licenses, bidders in the reauction will further adjust their strategies downward to reflect this change in the rules. The reauctioned licenses will be sold for considerably less. This is doubly detrimental to DigiPH and similar licenses. It devalues DigiPH's assets and saddles

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<sup>6</sup> Chairman's Separate Statement, at 6.

<sup>7</sup> DigiPH will file a Petition for Reconsideration of the Second R&O addressing the potential for massive devaluation of C block licenses on reauction and its effect on those entities which have made significant progress in the build out of their BTAs.

DigiPH with a greater burden of debt than its competitors who obtain licenses at a lower cost on reauction.<sup>8</sup>

2. Reauction Without Installments Devalues DigiPH's Collateral

C block licenses are substantial assets which underlie the stock pledges which serve as collateral for financing. When the reauction results in lower prices for licenses, this will have a significant negative impact on the value of the collateral of those licensees who have obtained financing and made progress toward launch of commercial service. A C block licensee whose collateral is reduced in value will have less money available to it under its financing arrangements—resulting in less capital for construction of C block networks. Once again, this will disadvantage the licensees who have proceeded with their build out. The ultimate loser is the American public which will have fewer options for wireless service providers. The Commission's proposal for reauction without installment payments is detrimental to the licensees who have played by the rules as originally promulgated, and ignores Congressional directive to promote competition and provision of service by a wide range of divergent entities.<sup>9</sup>

Adoption of the proposed reauction rules would punish DigiPH and other licensees who have made significant progress in building out their networks. These licensees have proceeded to construct their networks, have worked hard to execute their business plans, have abided by the Commission's rules and are about to launch commercial service. As a reward for playing by the

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<sup>8</sup> DigiPH can easily distinguish its auction bid price from D, E & F prices based on the availability of financing as well as on the amount of spectrum obtained. This distinction will not be available if the massive reauction envisioned under the Second R&O occurs.

<sup>9</sup> One of the stated goals of the Communications Act of 1934 (as amended) is to ensure that "new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. 47 U.S.C. § 309(j)(3)(B), *see also* 47 U.S.C. § 309(j)(4)(D).

rules, adopting the Commission's proposal would saddle DigiPH and other responsible C block licensees with higher prices for licenses than their competitors who obtain licenses on reauction at lower prices. The Commission simply cannot change the rules in mid-stream without visiting significant harm on those who abided by its original rules.

**B. Installment Payments are Necessary to Promote Meaningful Participation by Small and Diverse Entities in the Provision of Wireless Services and to Maintain the Integrity of the Auction Process**

1. FCC Policies Must Encourage Participation in the Auction Process by a Variety of Diverse Entities

Congress mandated that the FCC develop policies that promote "meaningful participation"<sup>10</sup> in the auction process by designated entities. In formulating its initial rules for the C block auctions, the Commission determined that installment payments were the key to meeting this goal. After considerable comment and development of a comprehensive record, the Commission concluded:

A significant barrier for most businesses small enough to qualify to bid in the entrepreneur's blocks will be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace . . . By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing will promote long-term participation by these businesses, which because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees.<sup>11</sup>

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<sup>10</sup> See 47 U.S.C. § 309(j).

<sup>11</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 ¶¶ 135-36 (1994). See Also, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994); Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996); Amendment of the Commission's Cellular/PCS Cross Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996).

Yet, in its proposal to eliminate installment payments, the Commission simply notes that “[w]e have conducted several auctions without installment payments.”<sup>12</sup> This ignores the prior, well-reasoned determination that installments are integral to promoting meaningful participation by designated entities.<sup>13</sup> More importantly, this does not change the fact that the rules for the original auction provided for installment payments. Such drastic change in policy at this late date is unfair to those entities which retain their licenses. Rather than encouraging participation by designated entities, the Commission’s proposed reauction hinders the ability of smaller businesses to participate in the provision of wireless services and eliminates the only program adopted by the FCC to meet the Congressional mandate of ensuring meaningful participation by small businesses and other designated entities.

2. The Commission’s Proposed Terms for the C Block Reauction Destroys the Integrity of the Auction Process

First and foremost among the Commission’s stated goals in adopting the Second Report & Order is “[m]aintaining the integrity of the Commission’s rules and auction processes.”<sup>14</sup> Fair

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<sup>12</sup> Second R&O ¶ 101.

<sup>13</sup> “While the FCC’s installment payment program has been successful in addressing barriers to capital faced by small businesses seeking to provide wireless services, it has also placed the FCC in the difficult role of being both a lender and a regulator.” In the Matter of FCC Report to Congress on Spectrum Auctions, *Report*, WT Docket No. 97-150, 35 (released October 9, 1997).

<sup>14</sup> Second R&O ¶ 2. The Commission has reiterated this goal in several other proceedings. *See, e.g.*, In the Matter of BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission’s Rules, *Memorandum Opinion and Order*, FCC 96-498, 12 FCC Rcd 3230 (1997); In the Matter of Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules, *Order*, DA 97-890 at ¶ 8 (released April 28, 1997); In Re Application of: Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E, and F Blocks, *Notice of Apparent Liability for Forfeiture*, FCC Docket No. 97-388 at ¶ 12 (released October 28, 1997).

treatment of those entities which bid responsibly and followed the original rules is essential to this goal. Specifically, the Commission must not take actions which harm those licensees who honored all of their auction obligations. To change the rules after the close of the initial auction, and thereby create competitive inequities among licensees in the same block of service is clearly bad policy making. Reauctioning spectrum without installments devalues the spectrum of those entities that retain their licenses, and thereby causes significant competitive disadvantages to those entities. Such unequal treatment of C block licensees undermines faith in the Commission's auction rules and is woefully detrimental to the integrity of the auction process. Thus, DigiPH urges the Commission to adopt installment payments for the C block reauction.

**C. Offering Increased Bidding Credits to Reauction Participants Does Not Make Up for the Elimination of Installment Payments**

The proposed rule does allow for higher bidding credits for those entities that qualify as very small businesses.<sup>15</sup> However, as noted above, those entities which have made significant progress toward commercial launch are not in a position to surrender their licenses or spectrum and start over under the Commission's new rules. This proposal simply does not make up for the loss of the installment payment option, and only widens the gap between the original C block licensees and those that obtain C block spectrum on reauction. The net effect of a reauction without installments is that "new" C block licensees will have a competitive advantage of lower embedded cost. Allowing for increased bidding credits does not rectify this inequity. In fact, it will likely increase the disparity between license costs for the original licensees as compared to

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<sup>15</sup> See Second R&O ¶ 100.



those who obtain licenses on reauction. Licensees who obtained their spectrum in the original auction will be at a serious competitive disadvantage for which bidding credits offers no relief.

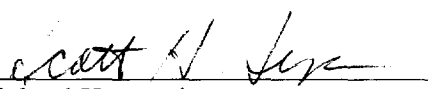
### **III. CONCLUSION**

The Commission's proposal to reauction returned spectrum without installment payments is detrimental to those C block licensees who bid responsibly in the C block auction pursuant to sound business plans, and have proceeded to finance and build out their networks. A reauction on the scale envisioned under the Second R&O, coupled with the elimination of installments, will result in a devaluation of spectrum. In light of all the intervening events and adverse publicity surrounding the problems of the large, financially-troubled C block players, if a massive reauction does not, on its own, substantially devalue the C block, a reauction on a cash basis surely will. This will force those entities which are not in a position to surrender licenses or spectrum to pay proportionately higher prices for their licenses. In addition, it devalues the licenses which underlie entities' collateral for their current financing. For DigiPH and similarly situated licensees, the Commission's proposal could place their financing in danger and hamper their ability to build their networks. Aside from removing the only program implemented to fulfill the Congressional mandate regarding designated entities, the reauction of spectrum without installment payments thwarts the higher goal of wide dissemination of licenses and

competition in the wireless marketplace. For the reasons stated herein, DigiPH urges that the Commission allow installment payments in the C block reauction.

Respectfully submitted,

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Dated: November 13, 1997